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IN THE

Supreme Court of the United States

October Term, 1956

No. 360

CAPITAL TRANSIT COMPANY, INC., *Petitioner*,

v.

JOSEPH B. SIMPSON, JR. and JANIE GAMMON LEE.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Of Counsel

August 29, 1956.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Capital Transit Company, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above captioned case on June 7, 1956.

OPINIONS BELOW

The District Court wrote no opinion . Its recorded remarks in denying the motion for judgment N.O.V. (R. 347-348) and its order thereon (R. 9) are not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 313-314) is not yet reported. It is reproduced herein as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1956 (R. 315). A petition for rehearing en banc was filed on June 22, 1956 (R. 316-331) and was denied per curiam July 11, 1956 (R. 352). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

In the trial of this cause, the critical issue was whether petitioner was entitled to a presumption that the owner-occupant consented to the negligence of the driver of his automobile in the absence of evidence that he relinquished his right of control. Petitioner requested the trial court to impute the negligence as a matter of law. This request was rejected. The only evidence offered by respondents on the issue of relinquishment was excluded by the court upon petitioner's objection because the record contained no evidence to rebut the presumption arising from ownership and occupancy. The Court of Appeals concluded in its opinion that the objections were improperly sustained.

1. Whether the unprecedented action of the Court of Appeals in inflicting penalties upon petitioner for

having taken these objections constitutes such a departure from the usual and accepted course of judicial proceedings as to justify the exercise of this Court's power of supervision.

2. Whether the Court of Appeals is required to remand the cause for further proceedings when it finds that the judgment complained of depends for its validity upon a finding of fact which concededly has never been made.

STATEMENT

Actions seeking damages for wrongful death were commenced (R. 1) in the United States District Court for the District of Columbia by co-administrators of the estate of James and Patricia Stricklin who were killed in an automobile-bus collision at Old Georgetown Road near its intersection with Maple Ridge Road, Bethesda, Maryland shortly after midnight on Saturday, December 27, 1952, (R. 13, 67). The collision occurred when Patricia Stricklin drove the Henry-J automobile of her husband James Stricklin directly into the rear of a large, eight foot wide, aluminum colored bus which had been stopped for some ten to twenty seconds with its right wheels two or three inches from the right edge of the travelled portion of the roadway in order to discharge passengers (R. 18, 20, 23, 26). Old Georgetown Road in that residential area is surfaced with macadam, straight and level, and thirty-four and one-half feet wide (R. 17, 23, 70). The night was clear, dark and cold. The visibility was good (R. 24, 147). There was a bus stop sign about nine feet off the macadam, and an unpaved shoulder slightly less than that in width adjacent to the travelled portion of the roadway (R. 18). The first of two debark-

ing passengers had reached the rear of the bus. He states that the collision occurred "like a thunder bolt out of the clear sky" (R. 148). There were no skid marks or other physical signs to indicate that the driver of the automobile had taken any measures at all to avoid the collision (R.).

Respondents contended that petitioner was negligent in two respects. First, in stopping the bus on the travelled portion of the roadway. Second, in failing to maintain proper lights on the rear of the bus (R. 5). The trial court correctly held that stopping the bus with all wheels on the roadway constituted no violation of Maryland law and charged that "Such stopping . . . is not in law a proximate cause of the accident" (R. 305). However, in the face of evidence that the bus lights, by inspection immediately prior to this particular run, had been found to be in proper function (R. 198); and that at the time of impact, the eye witness saw lights burning at the rear of the bus (R. 137, 138, 159); the trial court submitted, generally, the issues of negligence to the jury. Aside from interior lights which could be seen through two large rear windows, the back of this bus was equipped with two marker lights above the windows, two brake stop lights, two twin signal lights, a tail light and two reflectors (R. 159, 163-164, 192, 207). Some of these lights were not functioning after the crash (R. 20-21, 33-34). Three because of a melted fuse (R. 20-21), and one because of a broken bulb filament (R. 33-34). Respondent's contention that these lights were out prior to the collision was based solely upon contradicted expert testimony to the effect that the collision in their opinion did not cause the fuse to break from which respondents reasoned that the lights found to be out after the impact must have been that way before.

Petitioner's motions for a directed verdict were denied (R. 336, 341-342). The jury found primary negligence and contributory negligence on the part of Patricia Stricklin and returned verdicts for petitioner against the estate of Patricia Stricklin and against petitioner in favor of the estate of James Stricklin in the amount of Fifty Thousand Dollars ($50,000.00) (R. 6-7).

A fundamental principle, established by unanimous authorities, states that negligence of the driver of an automobile is imputable to its owner who is present therein with a legal right to control its operation. The issue on appeal involving that principle had been framed in an atmosphere of confusion. In the early stages of the twelve day trial, counsel for respondents took the position that negligence could not be imputed and represented that authorities in "all other states" except Louisiana and Missouri supported his view (R. 332-333). There was no such authority. Petitioner's counsel took the position that there was no evidence of relinquishment or abandonment of control and that therefore petitioner was entitled to a ruling as a matter of law imputing the negligence of Patricia Stricklin to James Stricklin (R. 336, 340, 346, 349). The trial court adamantly refused to accept this position (R. 336-339, 341, 344, 345, 348). Although the trial judge agreed that there was no evidence of abandonment of control and so instructed the jury (R. 347), he was of the opinion that the authorities were wrong in supporting this doctrine which in his view was "archaic". (R. 336, 341) The court's stated view was that the negligence of Patricia could not be imputed to James Stricklin on any basis (R. 336). This view, based upon the position advanced by respondents (R. 336, 340, 346, 349), permeated the entire charge (R. 344-347).

The Court of Appeals expressly rejected this view and stated the law to be that:

> "'If the car is negligently operated, it is presumed that the owner consented to the negligence. Therefore, *in the absence of proof that he abandoned the right of control*, he is liable for any damage resulting from the negligence of the driver.' *Powers* v. *State*, 178 Md. 23, 28 11 A2d 909, 911. (Emphasis added)" (R. 314)

The Court of Appeals apparently also disagreed with the trial court's finding (R. 347) that there was no evidence at all on the issue of abandonment of the right to control, because it concluded that, on the state of the record presented, the cause should have been submitted to the jury for its determination. (R. 314) Conflicting and irreconcilable positions were assumed by the Court of Appeals. Its conclusion that the issue should have been submitted to the jury must have been in contemplation of some evidence which the jury could have considered and yet it charged petitioner with having, by its objections, "induced" the trial court to exclude the only evidence on that issue and concluded from those objections and from the fact that petitioner asked for a ruling on a matter of law that petitioner had no standing to contest the propriety of the trial court's action in ruling as a matter of law that the negligence could not be imputed.

The transcript of the only attempt to introduce testimony upon the issue of abandonment of right to control (R. 333-335) is reproduced as appendix B, which is attached hereto for the convenience of the Court.

Since the Court of Appeals agreed with the legal principle urged by petitioner on appeal, and since the complaint herein involves the propriety of the action taken by the Court of Appeals, all issues were raised for the first time in the petition for rehearing filed on June 22, 1956 (R. 316-351).

REASONS FOR GRANTING THE WRIT

In support of its petition for writ of certiorari, petitioner states: (1) That the decision of the Court of Appeals is in direct conflict with the decision of the Court of Appeals for the Third Circuit (*Myles* v. *Philadelphia Transp. Co.*, 189 F2d 1014 (3d Cir. 1951); (2) the decision of the Court of Appeals is in direct conflict with prior decisions of this Court (*St. Paul Fire & Marine Ins. Co.* v. *Bachman*, 285 U.S. 112 (1932); *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80 (1943); (3) the disposition of this cause by the Court of Appeals constitutes such a departure from accepted and fundamental principles of judicial procedure as to call for the exercise of this Court's power of supervision.

1. The Decision of the Court of Appeals is in Direct Conflict With the Decision of the Court of Appeals for the Third Circuit

There can be no question but that under the law, as established by an unbroken line of reported decisions including that of the Court of Appeals herein, petitioner was entitled to a presumption that the owner-occupant consented to the negligence of the driver in the absence of evidence that he relinquished or abandoned his right to control the automobile. The burden of rebutting that presumption rested with respondents. They should have introduced all available evidence on the issue either by way of testimony or

proffer of proof and (2) framed, by submitting proper requests, the issues to be presented to the jury. Instead, respondents consistently maintained the position that there could be no imputation as a matter of law (R. 336, 340, 346, 349). Certainly respondents never demonstrated their entitlement to the instructions which were granted at their request on that issue. Petitioner's duly noted exceptions, with respect thereto (R. 332, 336-339, 340, 342, 345-348), should have been respected.

Respondent's efforts to satisfy their burden (R. 333-335) are set forth in their entirety in the appendix attached hereto. All of the proceedings directly involving the issues presented herein are set forth in an appendix to the petition for rehearing filed in the Court of Appeals (R. 316-351). Extra copies thereof have been supplied for the convenience of the Court. The first of a series of questions concerning Patricia Stricklin's driving ability, experience and reputation was objected to specifically as an attempt to prove the irrelevant fact that she, as a general rule, was a careful driver. It was properly sustained (R. 333). There followed a series of questions along the same vein. To each question, objections were made and sustained (R. 333-335). Counsel for respondents never made a clear proffer of the evidentiary object he was intending to accomplish. He stated:

> "The only purpose for the questions was to show that Jim was one of those men—there are some—who just don't like to drive. And whenever Jim and his wife went out anywhere, this is a family in which the wife was the chauffeur.
>
> * * *

> "It has nothing to do with my prima facie case, but it may have something to do if Mr. Horning should argue about the question of control." (R. 335)

This type of cryptic explanation does not satisfy the requirement of demonstrating materiality and relevancy clearly by a proffer. It is fundamental that one who fails to make an adequate proffer is precluded from contesting exclusionary rulings. *Origet* v. *Hedden*, 155 U.S. 228 (1894). If every word stated by respondents' counsel were to be accepted, there would still not be a sufficient basis for a finding that Mr. Stricklin had abandoned his right to control his automobile. The implication in the Court of Appeals' opinion that such a basis did exist is not sustained by the record. Criticism of the objections noted and sustained is unwarranted. The first objection made was specific. It certainly was properly made and sustained because it clearly appeared at that time that respondents were attempting to prove that Mrs. Stricklin was, generally speaking, a careful driver. Thereafter, the tenor of the questions did not change appreciably. There was no notice that the line of inquiry had been changed. Subsequent objections, although general, were presumably taken on the same basis as the first. The accuracy of the Court of Appeals statement that petitioner ". . . induced the court to exclude evidence offered by the plaintiff which bore directly on the question whether the husband had expressly or impliedly transferred all right of control to his wife" (R. 314), is certainly debatable. At best a doubtful situation was presented by the questions propounded. Petitioner's counsel had not only a right but a duty to his client to note an objection, because

failure to do so would preclude reliance upon the point in further proceedings. The duty to decide objectively questions of law which arise, rested with the trial court. No penalty can be inflicted upon petitioner because of the fact that the trial court sustained an objection which the Court of Appeals later decides is not well taken.

By ruling that a jury question was presented, the Court of Appeals, by necessary implication, either (1) held that there was sufficient evidence which could have supported a jury finding on the issue, or (2) held that the effect of defendant's objection was to supply the required testimony or to waive the necessity therefor. Since the record contains absolutely no evidence on the issue, the first conclusion seems improbable for the Court of Appeals would not deliberately distort the record in order to sustain a verdict. Therefore, it must have determined that as a result of the objection, the fact should be found against the contention of the objecting party. No such penalty is permitted either by reason and logic, or by legal precedence. As a practical matter, the Court of Appeals has ruled that issues for the determination of a jury would have been presented had petitioner not objected to the questions propounded. It concludes that since petitioner did object, it no longer has any right to contend that there is no substantial evidence, and to urge that the decision should be made in its favor as a matter of law. The court further ruled that petitioner had no standing, because of these events, to complain of the adverse direction to the jury on this issue even though it preserved its right to object thereto by duly noting exceptions to the ruling, and to the charge (R. 345-346).

In *Myles* v. *Philadelphia Transp. Co.*, 189 F2d 1014 (3d Cir. 1951) the Court of Appeals for the Third Circuit was presented with a case arising under Pennsylvania law which in material respects was factually identical to the instant case. The law of Pennsylvania, like the law of Maryland in this cause, provided for a presumption that the owner-occupant had a right to control his automobile which resulted in the imputation of negligence in the absence of evidence showing relinquishment or abandonment of the right to control. Defendant contended that the negligence was to be imputed as a matter of law. The trial court ruled as a matter of law that the negligence was not imputable. The Court of Appeals accepted neither proposition. It held that a question for the determination of the jury had been presented. No penalties were inflicted. The cause was reversed and remanded for a new trial with the direction to instruct the jury as the normal responsibility of the owner-occupant of an automobile and as to the possibility of his relinquishing the control and its consequent responsibility. This action paved the way towards a decision on the merits to be based upon a jury finding arrived at after deliberation guided by appropriate instructions on applicable legal principles.

The manner in which that Court discharged its responsibility provides a marked contrast to the procedure followed in the instant case. The opinion of the Court of Appeals in this case should not be left to conflict in letter, spirit and principle with that in the *Myles* case.

If this ruling is permitted to stand, a chaotic situation could develop wherein advocates, champions of their client's cause, would be unable to advance any untested argument for fear that if the trial judge agreed

and the Court of Appeals did not, he would have the issue involved decided against him as a matter of law on some estoppel basis. Let us assume that in the course of a trial of a breach of warranty action, plaintiff's counsel attempts to introduce a complaint previously filed by defendant, in an earlier unrelated cause, as an admission against interest that the product sold was defective; a point which though critical in the cause is unsupported by any other evidence. Whether or not the complaint is admissible is extremely questionable. If defendant objects and the trial court sustains the objection, the Court of Appeals would say that defendant "induced" the trial court to exclude the complaint and find that his product as a matter of law was defective when sold. If he does not object, the evidence could be considered whether or not it is objectionable and might provide the basis for a finding which defendant would be precluded from attacking. The strength and fairness of the judicial system of this nation was not developed by advocates who were compelled to operate in areas filled with such dilemmas. Certainly no precedence exists for the action taken by the Court of Appeals.

Reliance is placed in the opinion of the Court of Appeals upon a decision of this Court. *Louisville & Nashville R. Co.* v. *Parker*, 242 U.S. 13, 15 (1916). That case involved the critical issue of whether plaintiff's decedent was engaged in interstate commerce. If so the verdict obtained could not be sustained. The trial court assumed that the activities were intrastate. The railroad's defense was that the activities were interstate and it moved for a directed verdict on that ground. It did not frame an instruction seeking the jury's determination of the fact, although there

was conflicting evidence on the issue. It clearly had the burden of setting up its own defense and had no standing to complain about the failure of the trial court to charge the jury with respect to issues upon which no request was submitted. The decision is inapplicable because petitioner herein had no burden with respect to the issue of abandonment of right to control. It was entitled to rely upon the presumption until evidence substantial enough to rebut it was introduced. The burden of overcoming that presumption was clearly with respondents. Moreover, the judgment affirmed by the Court in the *Parker* case did not depend for its validity upon a finding not made for the judgment had perfect validity until if and when the defense of interstate commerce was pleaded and proved.

The Court of Appeals herein prescribed in its opinion that a finding of relinquishment or abandonment of control is necessary to escape the imputation of negligence from driver to owner-occupant (R. 314). Both Courts concede that there was no evidence presented on that issue (R. 314-341). The trial court instructed the jury that there was and could be no such evidence (R. 347), and directed them that they could not impute the negligence of the driver to the owner. Paradoxically, although the judgment admittedly depends for its validity upon a finding of fact which has never been made, it has been affirmed. Presumably, the Court of Appeals has supplied the missing ingredients.

2. The Decision of the Court of Appeals is in Direct Conflict With Prior Decisions of This Court

In *St. Paul Fire & Marine Ins. Co.* v. *Bachman*, 285 U.S. 112 (1932), the company depended on the In-

creased Hazard clause which required a showing of knowledge on the part of the insured and upon the Prohibited Articles Warranty which did not. A rider attached to the policy permitted the use of gasoline on the premises for bottling automobile oil and other purposes not more hazardous. At the time of the fire illegal liquor was being manufactured on the premises. The trial court concluded that this rider converted the Prohibited Articles Warranty into an increased hazard clause and charged the jury that knowledge on the part of the insured was essential with respect to both the first and the second defense. It also failed to submit the issue of whether use of gasoline in connection with a moonshine still was more hazardous than that in connection with bottling automobile oil. These rulings were erroneous. However, the company insistently maintained its position that it was entitled to a verdict as a matter of law if gasoline was used on the premises and did not request instructions which properly framed the factual issues presented. In considering the effect to be given to this failure this Court at page 118 said:

> "But the defendant's failure to ask proper instructions does not cure the error in the instructions which were given, and excepted to."

and at page 119:

> "The fact that the defendant had incorporated errors of law in the instructions which it sought upon the second defense did not justify putting the case to the jury solely upon the first."

In the *Backman* case the judgment which had been entered in favor of plaintiff depended for its validity upon a finding (1) that the actual use was not more hazardous than bottling automobile oil and (2) that

gasoline was kept there for that purpose whether or not plaintiff knew of it. These findings were not made and the court correctly observed that the trial court lacked the power to make them. To the same effect, see: *Brabham* v. *State of Mississippi*, 96 F2d 210 (5th Cir. 1938); *Harlem Taxicab Assn.* v. *Nemesh*, 89 U.S. App. D.C. 123, 191 F2d 459 (1951); *Callen* v. *Penna. R. Co.*, 162 F2d 832 (3d Cir. 1947), aff'd. 332 U.S. 625 (1948).

In *Securities Comm'n* v. *Chenery Corp.*, 318 U.S. 80 (1943) this Court stated at page 88:

> "But it is also familiar appellate procedure that where the correctness of the lower Court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury."

The action of the Court of Appeals is unwarranted and beyond the jurisdiction of that Court. It constitutes a clear usurpation of the jury's function and presents a clear and direct conflict with the decisions of this Court referred to.

3. The Disposition of This Cause by the Court of Appeals Constitutes Such a Departure From Accepted and Fundamental Principles of Judicial Procedure as to Call for the Exercise of This Court's Power of Supervision

Because of its local jurisdiction, the United States Court of Appeals for the District of Columbia Circuit has frequent occasion to rule upon common law principles, both substantive and procedural, and for that reason is able to exert great influence in the development of legal concepts, particularly in tort actions. Judges and lawyers in many states look to the United States Court of Appeals for the District of

Columbia Circuit as the highest federal Court with local jurisdiction for guidance in the decision of cases in their own jurisdictions. Because of the power, extraordinary supervision is warranted.

A study of the record in the trial court and of the reasons for what transpired there will demonstrate that the opinion of the Court of Appeals is not well reasoned and that there is very little logic or fairness supporting the result obtained. The errors are fundamental violations of due process. The Court of Appeals opinion permits a judgment to stand which is admittedly without foundation because in the Court's view petitioner did not seek proper relief. The omissions, however, were those which fell clearly within the burden of respondents. Petitioner was the defendant. It certainly could not have been expected to urge that the case should be presented to the jury. The objections taken were obviously bona fide and properly sustained. If they were not, the Court of Appeals should have reversed and remanded the cause for further proceedings in accordance with its opinion. The fact that petitioner contended for its rights, rather than for those of respondents, should not give rise to penalty. If the law is to remain strong and vigorous in the protection of the people, its court rooms must remain open forums within which advocates may meet to test legal principles. If the penalty for assuming a position which the appellate court thereafter concludes to be wrong is automatic forfeiture of the client's cause, lawyers will cease to be effective and judgments will be imposed irrespective of fault and irrespective of law.

We need not speculate with respect to the reasons which the Court of Appeals may have had for choos-

ing to disregard the fundamental concepts which are stated in the *Chenery, Bachman* and *Myles* cases. The fact is that those principles were disregarded. The action which was taken by the Court of Appeals constitutes such a departure from the accepted and usual course of judicial procedure as to call for the exercise of this court's power of supervision.

Upon first reflection, this cause may not loom large as the Court views the hundreds of petitions which it surely must receive; however, it is of extremely large moment not because of the Fifty Thousand Dollars involved in the immediate judgment, but because what has been done here typifies the kind of insidious erosion that is detrimental to the entire system of justice. A finger in the dam now will be long remembered by those who strive to maintain justice, in the sense of right and wrong, and to achieve objective fairness and equality in its application.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE D. HORNING, JR.
JOHN P. ARNESS
Counsel for Petitioner.

HOGAN & HARTSON
Of Counsel

August 29, 1956.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12900

CAPITAL TRANSIT COMPANY, APPELLANT

v.

JOSEPH B. SIMPSON, JR., *et al.*, APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided June 7, 1956

Mr. George D. Horning, Jr., with whom *Mr. John P. Arness* was on the brief, for appellant.

Mr. David G. Bress, with whom *Mr. Alvin L. Newmyer, Jr.*, was on the brief, for appellees.

Before EDGERTON, *Chief Judge*, and BAZELON and BASTIAN, *Circuit Judges*.

EDGERTON, *Chief Judge:* A husband and wife were killed when the automobile she was driving and in which he was riding struck the rear of a stationary Transit Company bus. The accident occurred in Maryland. An action for wrongful deaths was brought against the Transit Company in the United States District Court for the District of Columbia. The court directed a verdict for the defendant on the claim for the wife's death but submitted to the jury the claim for the husband's death. The defendant appeals from an adverse judgment on the latter claim.

We think the evidence relating to negligence of the defendant justified the trial court in submitting that issue to the jury.

The automobile in which the husband and wife were riding was registered in his name, though there was some evidence it was bought with their joint funds. The defendant asked the court to rule as a matter of law that the wife's negligence must be imputed to the husband. The court ruled as a matter of law that her negligence must not be imputed to him. In our opinion neither proposition is correct.

Since the accident occurred in Maryland, Maryland law must be applied. "If the car is negligently operated, it is presumed that the owner consented to the negligence. Therefore, *in the absence of proof that he abandoned the right of control*, he is liable for any damage resulting from the negligence of the driver." *Powers* v. *State*, 178 Md. 23, 28, 11 A. 2d 909, 911. (Emphasis added) We have no reason to think a different rule applies in respect to imputing the driver's negligence when the owner-passenger is not being sued but is suing a third person. See *Wallace* v. *Fowler*, 183 Md. 97, 104, 36 A. 2d 691, 694.

The defendant says in its reply brief that the question of the husband's responsibility for his wife's negligence should "at the very least" have been submitted to the jury "under proper instructions". It should have been submitted to the jury if that course had been requested. But the defendant not only failed to ask the trial court to submit the question to the jury, but went further and induced the court to exclude evidence offered by the plaintiff which bore directly on the question whether the husband had expressly or impliedly transferred all right of control to his wife. *Cf. Myles* v. *Philadelphia Transportation Co.*, 189 F. 2d 1014, 1017-18 (C.A. 3d). Since "the only ruling requested was properly denied the judgment must stand." *Louisville & Nashville R. Co.* v. *Parker*, 242 U.S. 13, 15.

Affirmed.

APPENDIX B

(At Record Pages 333-335)

By Mr. Bress:

Q. Do you have personal knowledge of Patricia's ability to drive? A. Yes.

Mr. Horning: I object to that.

The Court: On what ground?

Mr. Horning: That we are not trying a hypothetical situation of whether a person can drive an automobile. We are limited to what the driving condition was on the night of the accident. The most careful person can be negligent at times; the most negligent can be careful. That is no test at all.

The jury has to determine whether or not she was guilty of negligence at the time this accident occurred and not at some other time.

Mr. Bress: I want to show that Patricia was an excellent driver for more than one reason, and if he will stipulate that she was as of the day before this accident—of course he won't stipulate it as of the time of the accident, but will stipulate she was an excellent driver as of the day before the accident; I will.

Mr. Horning: I can't stipulate that; I have no knowledge of that.

The Court: I sustain the objection. Don't answer that, sir.

By Mr. Bress:

Q. Do you have personal knowledge of the extent to which Patricia drove the car without Jim?

Mr. Horning: Object.

The Court: I don't understand that question.

Mr. Bress: The extent to which she used the car for her own activities, without Jim being present.

The Court: What has that got to do with it? How does that help us?

Mr. Bress: It shows his confidence in her—
The Court: I sustain the objection.

By Mr. Bress:

Q. Have you been in the car with Jim and Patricia on occasions? A. Yes, sir.
Q. On frequent or infrequent occasions? A. Frequent.
Q. Will you state on those occasions that you have ridden with them whether—who was the driver?
Mr. Horning: I object.
The Court: I sustain the objection. Don't answer anything until I have had a chance to rule.
Mr. Bress: Will you state whether or not at any time in your presence Jim ever criticized Patricia about her driving?
Mr. Horning: I object.
The Court: Sustained.

By Mr. Bress:

Q. Will you state whether or not Jim liked or did not like to drive?
Mr. Horning: I object.
The Court: Sustained.

By Mr. Bress:

Q. Will you state whether or not you were in any kind of a car pool with Jim?
Mr. Horning: I object.
The Court: Sustained.

By Mr. Bress:

Q. Will you state whether or not in the car pool if Jim's car was being used, whether Jim drove or somebody else drove?
Mr. Horning: I object.
The Court: Sustained.
Mr. Bress: The purpose—
The Court: Are you relying—

Mr. Bress: Almost. But I think that I have a purpose for the questions—

The Court: I know you do.

Mr. Bress: I will be glad to—I think the relevancy may appear more clear at the later argument or I can state it to your Honor now unless you are satisfied that you don't want this evidence admitted at this time.

The Court: I am perfectly satisfied.

Mr. Bress: Very well.

The Court: I think it is clearly inadmissible.

Mr. Bress: The only purpose for the questions was to show that Jim was one of those men—there are some—who just don't like to drive. And whenever Jim and his wife went out anywhere, this is a family in which the wife was the chauffeur.

The Court: What has that got to do with it?

Mr. Horning: I object to this.

Mr. Bress: It has nothing to do with my prima facie case, but it may have something to do if Mr. Horning should argue about the question of control.

The Court: Don't anticipate Mr. Horning.

31/25

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SEP 29 1956
JOHN T. FEY, Clerk

IN THE

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OCTOBER TERM, 1956

No. 360

CAPITAL TRANSIT COMPANY, INC., *Petitioner*,

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JOSEPH B. SIMPSON, JR. and JANIE GAMMON LEE.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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September 29, 1956

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 360

CAPITAL TRANSIT COMPANY, INC., *Petitioner,*

v.

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OPINION BELOW

The opinion of the court of appeals (R. 313-314) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered June 7, 1956 (R. 315). Petition for rehearing (R. 316-331) was denied July 11, 1956 (R. 352). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether, in actions for wrongful death of husband and wife, the court of appeals was correct in holding that Maryland law required that the jury—not the trial court—decide whether the contributory negligence of the wife-driver be imputed to her husband.

2. Whether the court of appeals correctly applied *Louisville & Nashville R. Co.* v. *Parker*, 242 U. S. 13 (1916) in holding that petitioner—defendant below—had, by its conduct, waived jury submission of the issue of imputed negligence.

While a rehash of facts already stated more or less correctly in a petition for certiorari is as a rule unjustified, the petition in this case is so far a departure from the record herein that a counter-statement is both justified and necessary. Petitioner's "Statement" herein cannot ignore that petitioner is not now questioning—as it did below—the sufficiency of the evidence respecting primary negligence which supports this verdict and judgment in respondents' favor. Accordingly, a counter-statement is presented which briefly states the facts as they must now be presented—in favor of respondents.

COUNTER-STATEMENT

James and Patricia Stricklin, parents of the three infant children on whose behalf the instant suits were brought, were killed when their "Henry J" automobile collided with the rear of petitioner's bus. It was shortly after midnight, and the bus had stopped at an intersection in Bethesda, Maryland to discharge pas-

sengers. None of the bus' three rear lights, which Maryland requires, Md. Motor Vehicle Laws, §§ 237 (a), 238(b), nor any other rear lights, were functioning at the time (R. 46-49, 56-59, 91-93, 262-263). The two street lights on each side of the intersection were then inoperative (R. 17, 76, 85), and the rear of the bus was completely unilluminated by the nearest functioning street light (R. 101, 102). Wider than the bus, and adjoining the road, was a shoulder for "the use of vehicles" (R. 17-18, 20, 30, 241). This shoulder—which petitioner's regulations enjoined its drivers to use so as not "to interfere with other traffic" when discharging passengers (R. 116)—was in good condition, allowing its use with perfect safety (R. 18-19, Plaintiffs' Exhibits 2, 4, 6). The bus, its rear unlighted,[1] rather than pulling over to the shoulder, stopped with all four wheels at the unlighted intersection (R. 15, 17-18, 28, 219). The Stricklin car, with the wife driving, passed over a rise in the road about 380-400 feet from the intersection (R. 73-75, Plaintiffs' Exhibit 6) and collided with the rear of the unlit standing bus.

Throughout the entire two-week trial, petitioner argued that Mr. Stricklin was, as a matter of law, vicariously negligent merely because he was the sole titled owner of and a passenger in the automobile, and that contributory negligence on the part of his wife must be imputed to him as a matter of law, thereby foreclosing any recovery (R. 8, 9-10, Tr. 774-782, 827-828). At all times during trial, petitioner assiduously resisted jury submission of the issue of imputa-

[1] Although the interior lights of the bus were on, they appeared to approaching traffic as an isolated patch of light suspended over the roadway without outlining the figure of the bus (R. 108-109).

tion. The trial court ruled that under the circumstances, the wife's contributory negligence, if any, could not be imputed to the husband. After verdict, a motion for new trial was not sought, nor was error assigned at the trial (or in the main brief before the court of appeals) for failure to submit the issue of imputation to the jury.

The court of appeals ruled that imputation was a question of fact and not determinable as a matter of law, either in favor of or against Mr. Stricklin.[2] The trial court was, therefore, deemed correct in refusing petitioner's only requested instruction on that issue, but incorrect in not submitting the issue, as it did all the others, to the jury. In view of petitioner's conduct at trial, however, the lower court held that this omission was waived by petitioner.

ARGUMENT

The grounds asserted by petitioner in order to justify the granting of certiorari are wholly manufactured. We do not believe that they warrant detailed answers, nor, indeed, do certain assertions require any answer. We will be content to advance a few observations in order to focus the real nature of this case.

The gist of the lower court's opinion is waiver, pure and simple—a matter which fundamentally touches on policy questions, the solution of which calls for the exercise of a sound discretion in light of the precise

[2] Although not raisable in this opposition to the petition, we wish to make it clear, as stated in our brief below, that in our view the trial court in no way committed error but acted in precise compliance with Maryland law by instructing as it did against imputation.

circumstances involved. The court of appeals in this case simply refused to undo petitioner's wholly voluntary conduct—as exemplified before it and the trial court—in doggedly avoiding jury submission of the imputation issue.[3] The precedent cited for that determination was this Court's opinion in *Louisville & Nashville R. Co.* v. *Parker*, 242 U. S. 13 (1916), precisely like the case at bar.

There, Mr. Justice Holmes agreed with appellant railroad that the trial court erred in holding as a matter of law that appellee was *not* injured in interstate commerce. But at trial appellant in that case urged only that the jury be instructed that interstate commerce *was* involved. This Court held that since "the railroad did not ask to go to the jury, and the only ruling requested was properly denied, the judgment must stand." *Id.*, at 15.[4]

Petitioner misconceives the opinion below because it mistakes the *Louisville* case. Mr. Justice Holmes in that case did not make any finding on the issue of whether the injury occurred in interstate commerce; he merely held that the appellant had waived, through its own conduct, the necessity for such a finding. That

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[3] In its petition for rehearing in the court below (R. 325), petitioner candidly admitted that it "certainly had no interest in seeing this case or any part of it submitted to a jury. . . ."

[4] Petitioner's asserted distinctions of the *Louisville* case are erroneous. The burden of proof as to the disputed question of interstate commerce was, on the facts there involved, upon the plaintiff, not the railroad. *Philadelphia & Reading R. Co.* v. *Polk*, 256 U. S. 332 (1921). Therefore, the asserted distinction becomes an *a fortiori* basis for application of *Louisville* here, since the burden of proof as to imputation, like any other defense, rested on petitioner—defendant below—not respondents.

is precisely what the court of appeals held in the instant case in respect to the issue of imputation. The distinction between waiver and determination of an ordinary fact question is too elementary to permit their confusion. The doctrine of waiver is particularly applicable in the instant case in view of petitioner's failure to file a motion for new trial or even complain of the trial court's conduct in this respect in its main brief before the court of appeals. While there may well be other cases involving other circumstances similar but not identical to the instant one in which such a waiver may not be spelled out,[5] it is submitted that the discretion exercised by the lower court herein was a sound one which poses no problem justifying certiorari herein.

Petitioner's hue and cry that it was "penalized" by the court of appeals also misconceives the nature of appellate review. The lower court pointed out that petitioner induced the trial court to erroneously exclude certain evidence offered by respondents to show that Mr. Stricklin relinquished whatever right of control he had over the management of the car (R. 128-130). In so stating, the lower court was not making "substituted" findings. It was only adverting to an additional circumstance which illustrated petitioner's consistent and erroneous position at trial that Mr. Stricklin was vicariously negligent as a matter of law

[5] Such a case was *St. Paul F. & M. Ins. Co.* v. *Bachman*, 285 U. S. 112 (1932) where *Louisville* was not relied on or discussed. In *St. Paul*, the failure of appellant to request jury submission of an issue involved in its second defense appeared to be wholly inadvertent since the very same issue was duly requested by appellant and submitted to the jury in connection with its first defense. *Id.*, 285. Supreme Court Records and Briefs, Transcript of Record, Defendant's Instruction No. 5, at page 150.

simply because he was the sole titled owner of and passenger in the automobile.

In view of petitioner's shift of position on appeal that title of and presence in the car, while not conclusive, gave rise to a presumption of agency which respondents did not rebut, the lower court might well have mentioned that petitioner could not claim an advantage as a result of its having induced error below. *New York Elev. R. Co.* v. *Fifth Nat. Bank*, 135 U. S. 432 (1890); *Rosaly* v. *Gonzalez*, 106 F. 2d 169 (1st Cir. 1939); *Missouri, K. & T. R. Co.* v. *Elliot*, 102 Fed. 96, 103-104 (8th Cir. 1900); *Boatmen's Bank of St. Louis* v. *Fritzlen*, 221 Fed. 145 (8th Cir. 1915); *Bursey* v. *Lyon*, 32 App. D. C. 231, 236 (1908). In other words, petitioner cannot claim, as it did in the court of appeals, that a presumption existed which was unrebutted when, in fact, such rebuttal evidence was erroneously excluded at its very own insistence. Petitioner in effect now claims that, because the lower court prevented it from gaining by the error which it induced, a penalty by way of "substituted" finding was inflicted. This is nonsense.

What this case is really about, but is being concealed by way of wholly fanciful and exaggerated "issues", is whether the court of appeals was correct in holding that the issue of imputation should have been submitted to the jury. While we believe the record and Maryland authorities support the trial court's disposition in instructing against imputation, at the very least they amply justify the conclusion of the court of appeals that the question herein was one of fact. If the issue was one of fact, then this case is in all respects like *Louisville*. That is the nub of

this case. There is no other issue involved, and petitioner's failure to so frame the issue reflects its understanding that there is no question involved which merits review by way of certiorari.

CONCLUSION

The decision below is correct and in accord with the decisions of this Court. The case does not present any conflict of decisions or question of importance. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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